

INITIAL STATEMENT OF REASONS

TITLE 2. ADMINISTRATION DIVISION 3. STATE PROPERTY OPERATIONS CHAPTER 1. STATE LANDS COMMISSION ARTICLE 4.9. MARINE INVASIVE SPECIES ACT ENFORCEMENT AND HEARING PROCESS

SPECIFIC PURPOSE OF THE REGULATION

The purpose of the proposed regulation is to adopt Article 4.9 of Title 2, Division 3, Chapter 1 of the California Code of Regulations (CCR), specifically:

- Adopt sections 2299.01, 2299.02, 2299.03, 2299.04, 2299.05, 2299.06, 2299.07, 2299.08, and 2299.09.

The purpose of this Article is to establish an administrative enforcement process for violations of the Marine Invasive Species Act (Act). Article 4.9 establishes policies and procedures the Executive Officer of the California State Lands Commission shall undertake in assessing administrative civil penalties as allowed by section 71216 of the Public Resources Code. The proposed regulations are necessary to minimize the transfer of nonindigenous species from vessels into state waters.

PROBLEM STATEMENT

Public Resources Code (PRC) section 71201(d) declares that the purpose of the Act (PRC section 71200 *et seq.*) is to “move the state expeditiously toward elimination of the discharge of nonindigenous species (NIS) into the waters of the State or into waters that may impact the waters of the State”. NIS are organisms that have been transported by humans to locations where they do not naturally or historically occur. Once established, NIS can have adverse economic, ecological, and public health consequences. The Act controls NIS introduction by regulating operational and reporting requirements for ocean going vessels and barges entering the state’s ports or places.

To implement the mandate of the Act, PRC section 71201.7 provides authority for the Commission to adopt regulations. To that end, the Commission has adopted Articles 4.5, 4.6, 4.7, and 4.8 (Title 2, CCR). These regulations represent a comprehensive set of requirements, both operational (ballast water and biofouling management) and administrative (reporting and recordkeeping), to help prevent vessel borne introduction of NIS into the waters of the state.

To ensure compliance with the Act and associated regulations, PRC section 71206 mandates that the Commission inspect at least twenty-five percent of arriving vessels subject to the Act. During vessel inspections, Commission staff interview members of the vessel crew and review vessel paperwork, including:

- All required forms (see section 2299.03(c) below),
- locations of ballast water exchange (if applicable),
- ballast water management plans, and
- ballast water logbooks.

If these items are not compliant, the vessel is cited for a violation. In addition to the mandated onboard vessel inspections, Commission staff perform quarterly compliance assessments on all submitted Ballast Water Reporting Forms.

If a vessel is determined to be noncompliant with any of the provisions of the Act or associated regulations (Articles 4.5, 4.6, 4.7 and/or 4.8), Public Resources Code section 71216 authorizes the Commission to assess administrative civil penalties in an amount that shall not exceed twenty-seven thousand five hundred dollars (\$27,500) for each violation. Although the Commission is authorized to assess administrative penalties for violations of the Act, there are currently no regulations clearly defining the process by which these penalties are assessed.

Article 4.9, therefore, is necessary for codifying the procedures to assess administrative civil penalties into regulation. Although, as discussed below, compliance rates for the Act are high, a transparent process for assessing penalties will maximize the tools available to protect state waters from the impacts of NIS.

BENEFITS

Since the inception of the Marine Invasive Species Program, compliance rates with ballast water management rules have been high. From 2006–2014, approximately eighty-four percent of qualifying voyages to California ports reported retaining all ballast water onboard while in California waters as an option to comply with the Act or regulations. Retention of ballast water is the most protective ballast water management option available to prevent species introductions from the ballast water vector.

Although retention of ballast water is the most protective ballast water management option available, not all vessels can retain ballast water due to cargo operations or safety concerns. Therefore, many vessels utilize ballast water exchange to manage ballast water prior to discharge and comply with the requirements of the Act and associated regulations.

While only 16% of vessel that arrive in California discharge ballast water, the total volume of ballast water discharged in the state is on the rise. Over 6.9 million metric tons of ballast water were discharged in California in the first half of 2014 – more than in any six-month time period over the last 10 years (Dobroski et al., 2015).

Despite the increase in overall volume of ballast water discharges, compliance rates remain high. From 2014-2015, ninety-eight percent of the ballast water carried to California was reported by vessels as managed prior to discharge in compliance with the Act. The water was either retained on board the vessel (i.e. not discharged) or managed through ballast water exchange (BWE) at compliant distances from land.

The majority (80% by volume) of noncompliant ballast water discharged was managed through the use of ballast water exchange, but the exchange occurred in the wrong location (i.e. the ballast water was exchanged at 150 nautical miles (NM) from land instead of the required 200 NM). However, water that undergoes some type of management, even if in the wrong location, reduces the risk of NIS introductions.

Water that does not undergo any type of management represents the highest risk for NIS introductions from ballast water; 20.4% of noncompliant discharges (by volume) fall into this highest risk category. These discharges of unmanaged ballast water still commonly occur. During the two-year period between 2014 and 2015, thirty-two vessels, representing 167 individual ballast tanks, discharged a volume of 190,000 metric tons of unmanaged ballast water into CA waters.

The Commission is authorized to assess administrative penalties for violations of the Act and associated regulations. However, there are currently no regulations defining the process by which these penalties are assessed. Therefore, the proposed regulation establishes a transparent process for assessing administrative penalties to enforce the Act. This regulation will strongly discourage violations of the Act, potentially increasing compliance. Although compliance by the regulated community is high, every noncompliant discharge, or any other noncompliance with the Act and associated regulations (e.g. biofouling management) threatens to introduce NIS that may end up harming human health, the economy, or the coastal environment.

The proposed regulations will serve the following functions:

- Classify the specific violations of the Act and associated regulations for which administrative penalties may be assessed;

- Establish the maximum administrative penalty for each violation based on the relative risk each violation has of introducing NIS into the waters of the state;
- Clearly describe the steps the Commission and its Executive Officer may take once a violation has been determined to have occurred;
- Describe the steps the cited party may take once a violation has been determined to have occurred;
- Provide a transparent process for the assessment of violations and administrative penalties to the cited party and the regulated community; and
- Provide transparency on the rights of the cited party once a complaint has been filed.

ECONOMIC IMPACT ASSESSMENT

The proposed regulations establish procedures the Executive Officer of the California State Lands Commission shall undertake to assess penalties and commence with administrative enforcement actions pursuant to California Public Resources Code section 71216. Commission staff has determined that the proposed regulations will have no significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

EVIDENCE SUPPORTING NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON BUSINESS

Any costs associated with the proposed regulation stem from existing law. The regulated community has been obligated to comply with the statutes and regulations of the MISP since 2000. This proposed regulation simply defines a specific process for assessing penalties and conducting an administrative civil hearing process authorized under the Act. Because the penalties arise from violation of other existing law, they are not directly or indirectly attributable to this proposed rulemaking. As explained in the form STD 399 submitted, as part of this rulemaking, there may be costs to the Commission by way of enforcement actions, however, those costs will be absorbed by the agency and do not affect business (see form STD 399 and Assumptions Sheet, contained within the rulemaking record).

Potential cost impacts on representative persons or businesses are summarized below and are categorized by the major provisions of the proposed regulations.

(A) The creation or elimination of jobs within the State of California

Analysis: The proposed regulation establishes penalties and defines the enforcement hearing process for vessels operating in California subject to the Act. Costs associated with the proposed regulation would be from penalties assessed due to violations of existing law. The regulated community has been obligated to comply with the statutes and regulations of the Marine Invasive Species Program (MISP) since 2000. The proposed regulation defines a specific administrative process for assessing penalties for violations. This process is already authorized under the Act. As discussed in the “Benefits” discussion above, the level of compliance under the Act is high and compliance levels are expected to increase as a result of the proposed regulations. While the amount of each violation may potentially be high, penalties derive from violations of the Act and not from the proposed regulations itself. Therefore, compliance with these proposed regulations adds no additional cost to businesses.

Conclusion:

- The proposed regulation will have no impact on the creation or elimination of jobs within the State of California.

(B) The creation of new businesses or the elimination of existing businesses within the State of California

Analysis: The proposed regulation establishes penalties and defines the enforcement hearing process procedures for vessels operating in California subject to the Act. The proposed regulation defines a specific process for assessing administrative penalties for violations of the Act. Because the regulated community has been operating under the statutes and regulations of the MISP since 2000, and the proposed regulations do not add new operational requirements, the proposed regulations are not expected to effect the creation or elimination of businesses within the state.

Conclusion:

- The proposed regulation will have no impact on the creation of new businesses within the State of California.
- The proposed regulation will have no impact on the elimination of businesses within the State of California.

(C) The expansion of businesses currently doing business within the State of California and ability to compete with businesses in other states

Analysis: The proposed regulation establishes penalties and defines the enforcement hearing process procedures that the Commission will take for vessels found to be in violation of the Act or associated regulations. Any costs associated with the proposed regulation would be as a result of penalties assessed due to violations of existing law. The regulated community has been obligated to comply with the statutes and regulations of the MISP since 2000. The proposed regulation defines a specific process for assessing penalties and an administrative process authorized under the Act. The proposed action will not affect costs of businesses who continue to comply with the Act and associated regulations. Additionally, vessel operators must comply with the Act when operating in California regardless of whether they are businesses based in California or without. As stated above, because the proposed regulations do not add additional costs to businesses overall, the regulations will not have any impact on the ability of California businesses to compete in other states.

Conclusion:

- The proposed regulations will have no impact on the expansion of businesses currently conducting businesses within the State of California.

(D) Benefits of the regulations to the health and welfare of California residents, worker safety, and the State's environment

Analysis: The proposed regulations establish penalties and define the enforcement hearing process and procedures for vessels operating in California subject to the Act. The proposed regulations do not make changes to existing worker safety requirements, and therefore should not have a significant positive or negative impact on worker safety within the State of California.

The proposed regulations are expected to benefit both the state's environment and the health and welfare of California residents.

NIS and invasive species have impacted California's economy, human health, and environment. NIS and invasive species threaten the coastal tourism and recreation industries. In 2011, these industries represented nearly \$17 billion (NOEP 2014) of California's Gross State Product. Additionally, in the United States, invasive species are believed to be responsible for approximately \$120 billion in losses and damages each year (Pimentel et al. 2005).

Of the more than 250 currently established NIS in California's coastal waters, up to 81% are believed to have been introduced through the discharge of ballast water and from

vessel biofouling (Ruiz et al. 2011). In recognition of the substantial threat to the State's economy, environment, and human health, the California Legislature passed the Marine Invasive Species Act (2003). Amendments to the Marine Invasive Species Act in 2007 require vessels to also manage biofouling to reduce NIS introductions into California's coastal waters.

By establishing a process for the enforcement of violations of the Act, the proposed regulations are expected to increase vessel compliance with the Act resulting in a reduction in the likelihood of introducing NIS into California waters. Vessels already complying with the Act will be unaffected by the proposed regulations.

These regulations satisfy the purpose of the Act, which is (PRC section 71201(d)) "to move the State expeditiously toward elimination of the discharge of nonindigenous species into the waters of the State."

Conclusions:

- The proposed regulations will have no impact upon worker safety within the State of California.
- By potentially increasing compliance with pre-existing law, Commission staff has determined that the proposed regulations will significantly benefit:
 - The health and welfare of California residents; and
 - The State's environment.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS RELIED UPON

Peer-reviewed primary literature

Cordell, J., Lawrence, D., Ferm, N., Tear, L., Smith, S., Herwig, R. 2009. Factors influencing densities of non-indigenous species in the ballast water of ships arriving at ports in Puget Sound, Washington, United States. *Aquatic Conservation: Marine and Freshwater Ecosystems* 19:322-343.

Drake, L., Ruiz, G., Galil, B., Mullady, T., Friedman, D., Dobbs, F. 2002. Microbial ecology of ballast water during a transoceanic voyage and the effects of open-ocean exchange. *Marine Ecology Progress Series*. 233:13-20.

Gray, D., Johengen, T., Reid, D., MacIsaac, H. 2007. Efficacy of open-ocean ballast water exchange as a means of preventing invertebrate invasions between freshwater ports. *Limnology and Oceanography* 52:2386-2397.

MacIsaac, H.J., T.C. Robbins, and M.A. Lewis. 2002. Modeling ships' ballast water as invasion threats to the Great Lakes. *Canadian Journal of Fisheries and Aquatic Science* 59: 1245-1256.

Minton, M.S., E. Verling, A.W. Miller, and G. M. Ruiz. 2005. Reducing propagule supply and coastal invasions via ships: effects of emerging strategies. *Frontiers in Ecology and the Environment* 3: 304- 308.

Pimentel, D., Zuniga, R., Morrison, D. 2005. Update on the environmental and economic costs associated with alien-invasive species in the United States. *Ecological Economics* 52: 273-285.

Ruiz, G.M., Fofonoff, P.W., Steves, B., Foss, S.F., Shiba, S.N. 2011. Marine invasion history and vector analysis of California: a hotspot for western North America. *Diversity and Distributions* 17: 362-373.

Wonham, M.J., W.C. Walton, G.M. Ruiz, A.M. Frese, and B.S. Galil. 2001. Going to the source: role of the invasion pathway in determining potential invaders. *Marine Ecology Progress Series* 215: 1-12.

Technical and/or government documents

Barth, J., Collins, C. and B. Hickey. 2002. West Coast Oceanography: Implications for Ballast Water Exchange. Draft Report. Edited by K. McDowell and M. Sytsma. 36 pp.

Dobroski, N., Brown, C., Nedelcheva, R., Scianni, C., Thompson, J., 2015. 2015 Biennial report on the California Marine Invasive Species Program. Produced for the California State Legislature. 133 pgs.

USCG (United States Coast Guard). 2001. Report to Congress on the voluntary national guidelines for ballast water management. Appendix B: Status and trends of ballast water management in the United States. Biennial Report for the National Ballast Information Clearinghouse. 45 pp.

DGS (Department of General Services). State of California Department of General Services 2015-2016 Price Book.

Periodicals and internet-based sources

NOEP (National Ocean Economics Program). 2014. Market – Ocean Economy search. Website: <http://www.oceaneconomics.org/Market/ocean/oceanEcon.asp>.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

The proposed regulation is the only alternative that was considered in the preparation of this rulemaking. This regulation pertains only to those vessels found to be in noncompliance with pre-existing statute and regulations. In addition, the extent of the penalties assessed under the proposed regulation and the method for doing so is statutorily defined and limited. Commission Staff has determined that there are no alternatives considered that could be adopted via regulation and that would be more effective in carrying out the purpose of the proposed regulations, or would be as effective and less burdensome to affected private persons, or would lessen any adverse impact on small business. In addition, no alternatives have been presented to the Commission by interested parties that would achieve the goals identified above.

SMALL BUSINESS IMPACTS

The Commission finds that the adoption of this regulation will not have a significant adverse economic impact on small businesses. The regulation outlines the processes and procedures for an administrative penalty to be assessed for violations of the Act and associated regulations. The majority of the regulated community is headquartered overseas and not considered small businesses, except for a few barge companies headquartered in California. Continued compliance with the Act and regulations adds no additional economic burden to these companies.

REGULATIONS MANDATED BY FEDERAL LAW

Per Government Code 11346.2(c), Commission staff finds that the proposed regulation is not mandated by federal regulation.

EFFORTS TO AVOID UNNECESSARY DUPLICATION OR CONFLICTS WITH FEDERAL REGULATIONS

These proposed regulation is promulgated pursuant to PRC section 71216. Although the federal government regulates ballast water management, the Commission is proposing this regulation under authority granted by the California Legislature. The proposed regulation is designed to implement an administrative civil penalty procedure that will assist in enforcing state laws and regulations that already exist. Because this proposed action applies to the function of state law, no duplication or conflict with federal regulations are expected to occur.

Title 2, Division 3, Chapter 1, Article 4.9, Marine Invasive Species Act Enforcement and Hearing Process

The following is a statement of the specific purpose and rationale for each adoption under the proposed rulemaking. Prior to the explanation for each provision, the text of the regulation is set forth and indented. Proposed additions to the regulation are underlined.

Section 2299.01 Purpose and Applicability

- (a) The purpose of the regulations in Title 2, Division 3, Chapter 1, Article 4.9 of the California Code of Regulations is to establish policies and procedures the Executive Officer of the California State Lands Commission shall undertake in assessing and commencing administrative enforcement actions pursuant to California Public Resources Code section 71216.

SPECIFIC PURPOSE OF THE ADOPTION

Section 2299.01(a) addresses the overall intent of the proposed regulations in Article 4.9.

NECESSITY

Section 2299.01(a) is necessary to specify the purpose of the regulations. PRC section 71201.7 authorizes the Commission to adopt regulations to implement the provisions of the Marine Invasive Species Act (the Act).

- (b) This article shall govern the enforcement and procedures related to violations of any of the provisions of Division 36 of the Public Resources Code and Title 2, Division 3, Chapter 1, Articles 4.5, 4.6, 4.7, and 4.8 of the California Code of Regulations.

SPECIFIC PURPOSE OF THE ADOPTION

The purpose of this provision is to identify the specific Division of the Public Resources Code and Articles of the California Code of Regulations that Article 4.9 will address.

NECESSITY

This subsection is necessary to define the sections of the PRC and articles of the CCR subject to the enforcement and hearing processes described herein.

- (c) The provisions of this article apply to all vessels, United States and foreign, carrying, or capable of carrying, ballast water into the coastal waters of the state after operating outside of the coastal waters of the state as well those vessels operating exclusively within the pacific coast region, except those vessels described in section 71202 of the Public Resources Code.

SPECIFIC PURPOSE OF THE ADOPTION

This specific purpose of this provision is to specify the vessels to which these regulations apply.

NECESSITY

This provision aligns with PRC sections 71201(a) and 71204.6. These PRC sections specify the vessels to which the Act and the proposed regulations shall apply. The proposed regulations would not apply to vessels of the armed forces or vessels in innocent passage through California waters, as defined by PRC section 71202.

Section 2299.02 Definitions

- (a) "CCR" means the California Code of Regulations.
- (b) "Cited Party" means the master, owner, operator, agent, or person in charge of a vessel that has violated a provision or provisions of the California Marine Invasive Species Act (codified as Cal. Pub. Resources Code § 71200 et seq.) or title 2, California Code of Regulations, Articles 4.5, 4.6, 4.7, and 4.8.
- (c) "Coastal waters" means estuarine and ocean waters within 200 nautical miles of land or less than 2,000 meters (6,560 feet, 1,093 fathoms) deep, and rivers, lakes, or other water bodies navigably connected to the ocean.

- (d) “Commission” means the California State Lands Commission.
- (e) “Exchange” means to replace the water in a ballast tank using, and strictly complying with, either of the methods described in Division 36, Chapter 1, of the California Public Resources Code section 71200, subdivision (h).
- (f) “Executive Officer” means the Executive Officer of the California State Lands Commission or any person designated by the Executive Officer to act on behalf of the Executive Officer.
- (g) “Incorrect exchange” means an exchange that is not performed in full compliance with either of the methods described in Division 36, Chapter 1 of the California Public Resources Code section 71200, subdivision (h).
- (h) “Land” means the material of the earth, whether soil, rock, or other substances that sit landward of, or at an elevation higher than the ocean’s mean high-tide line. Land includes rock outcroppings or islands located offshore.
- (i) “PRC” means Public Resources Code.

SPECIFIC PURPOSE OF THE ADOPTION

The specific purpose of section 2299.02 is to define key terms that are used throughout the language of the regulations to clarify the overall intent of the proposed regulations.

NECESSITY

Specific terms are used throughout the regulatory text to describe fundamental components of the regulations. Without clarification, many of these terms can be subject to differing interpretation. These definitions are therefore necessary to ensure the regulations precisely express the intended meanings of these terms.

Section 2299.03 Classification of Violations

A violation of any provision within Division 36, Chapter 2 (comprising sections 71203 through 71207), of the PRC or Title 2, Division 3, Chapter 1, Articles 4.6, 4.7, and 4.8 of the CCR shall be considered within one of three classes:

(a) Class 1: Class 1 violations shall be issued to a cited party when a vessel discharges ballast water in the coastal waters of the state without first complying with the appropriate ballast management practices identified in section 71204.3 of the PRC or 2 CCR section 2284.

(1) Class 1 violations will be considered to be:

(A) Minor:

1. if a vessel subject to section 71204.3, subdivision (c) of the PRC, prior to discharging ballast water into the coastal waters of the state, performs an incorrect exchange of ballast water in an area less than 200 nautical miles and equal to or greater than 180 nautical miles from land; or
2. if a vessel subject to 2 CCR section 2284, prior to discharging ballast water into the coastal waters of the state, performs an incorrect exchange of ballast water in an area less than 50 nautical miles and equal to or greater than 45 nautical miles from land.

(B) Moderate:

1. if a vessel subject to section 71204.3, subdivision (c) of the PRC, prior to discharging ballast water into the coastal waters of the state, performs an incorrect exchange of ballast water in an area less than 180 nautical miles and equal to or greater to 100 nautical miles from land;
2. if a vessel subject to 2 CCR section 2284, prior to discharging ballast water into the coastal waters of the state, performs an incorrect exchange of ballast water in an area less than 45 nautical miles and equal to or greater to 25 nautical miles from land; or
3. any additional Class 1 Minor violations committed on a subsequent voyage committed within twelve (12) months of a preceding Class 1 Minor violation shall be considered a Class 1 Moderate violation.

(C) Major (I):

1. if a vessel subject to section 71204.3, subdivision (c) of the PRC, prior to discharging ballast water into the coastal waters of the state, performs an incorrect exchange of ballast water in an area less than 100 nautical miles from land;
2. if a vessel subject to 2 CCR section 2284, prior to discharging ballast water into the coastal waters of the state, performs an incorrect exchange of ballast water in an area less than 25 nautical miles from land; or
3. any additional Class 1 Moderate violations committed on a subsequent voyage committed within twelve (12) months of a preceding Class 1 Moderate violation shall be considered a Class 1 Major (I) violation.

(D) Major (II):

1. if a vessel, subject to section 71204.3, subdivision (c) of the PRC or 2 CCR section 2284, prior to discharging ballast water into the coastal waters of the state, fails to perform any ballast water exchange during its voyage.

SPECIFIC PURPOSE OF THE ADOPTION

The specific purpose of this section is to define the Class 1 violations which refer to the management of discharged ballast water as identified in PRC section 71204.3 or 2 CCR section 2284. The violations pertaining to ballast water exchange in subpart (a) are further divided into categories based on the distance from land the noncompliant ballast water exchange occurred, or whether it occurred at all. The purpose for classifying violations based on distance from land reflects the increased risk of NIS introduction when vessels discharge ballast close to shore without proper ballast water exchange.

NECESSITY

Subsection (a) is necessary to describe the classes of violations pertaining to the management of discharged ballast water and biofouling in California waters.

Regarding ballast water, there are several ways a vessel can manage ballast water to comply with existing statute and regulations and reduce the likelihood of introducing NIS to California waters, including:

- (1) Retain all ballast on board the vessel;
- (2) Conduct a mid-ocean or coastal (depending on last port of call) ballast water exchange;
- (3) Use an alternative, environmentally sound, Commission or USCG-approved method of management (such as an USCG accepted Alternative Management System);
- (4) Discharge the ballast water to an approved reception facility (currently there are no such facilities in California);
- (5) Discharge ballast water at the same location where it was taken on, provided that the ballast water has not been mixed with water taken on in an area other than mid-ocean waters; and
- (6) Under extraordinary circumstances, perform a ballast water exchange in an area agreed to in advance by the Commission in consultation with the USCG.

The majority of vessels discharging ballast water into California waters manage that ballast water by conducting either an open-ocean (greater than 200NM from land) or coastal (greater than 50NM from land) ballast water exchange (BWE). The required distance from land that a BWE must be conducted is dependent on the vessel's last port of call (see PRC section 71204.3 and CCR section 2284). Properly conducted BWE has been shown to reduce between 70-99% of the number of "source" organisms taken into a ballast tank (USCG 2001, Wonham et al. 2001, MacIsaac et al. 2002).

During BWE, "source" organisms from ballast water picked up in ports and coastal areas are flushed far offshore where they are not well adapted to survive. Mid-ocean and near-coastal BWE, at distances equal to or greater than the prescribed distances from land, reduce the risk of NIS introductions into California waters (Drake et al., 2002, Gray et al., 2007, Cordell et al., 2009). Conversely, organisms picked up offshore during BWE are not likely to survive when discharged in port, due to dramatically different physical, chemical, and biological conditions between the two environments.

Commission staff classified noncompliant BWE violations into separate classes, Minor, Moderate, and Major (I), based on the distance from land the BWE occurred because the closer to land a vessel performs a BWE, the greater the chance that the organisms released during the BWE will become entrained in coastal currents (Barth et al., 2002). An organism, once caught in the coastal currents, has a higher potential risk of reaching the shoreline and being introduced.

While performing a BWE at less than the prescribed distances increases the potential risk of NIS introduction, the greatest risk to the waters of California is from the discharge of unmanaged/unexchanged ballast water. It has been shown that the transfer of ballast water from “source” to “destination” ports can result in the movement of many organisms from one region to the next. It is estimated that each unmanaged (i.e. no BWE) ballast water discharge has the potential to release over 21.2 million individual planktonic animals (Minton et al. 2005).

The potentially very high number of organisms in an unexchanged ballast water discharge into California waters greatly elevates the probability that a NIS introduction may occur. Therefore, Commission staff put unmanaged/unexchanged ballast water discharges in a class by itself as the highest level of violation, Major (II).

(b) Class 2: Class 2 violations shall be issued to a cited party when a vessel fails to properly maintain on board the vessel, as required:

- (1) a ballast water management plan pursuant to section 71204, subdivisions (h) and (i) of the PRC;
- (2) a ballast water log pursuant to section 71205, subdivision (d) of the PRC; or
- (3) any other information that is required to be carried or maintained on board a vessel pursuant to section 71205 of the PRC.

SPECIFIC PURPOSE OF THE ADOPTION

The purpose of subpart (b) is to identify the Class 2 violations, which pertain to records required to be kept on board vessels as identified in PRC sections 71204 and 71205.

NECESSITY

Subsection (b) is necessary to describe the Class 2 violations. Class 2 violations apply to recordkeeping requirements established by PRC sections 71204 and 71205. PRC section 71204 requires vessels to maintain a vessel-specific ballast water management plan. PRC section 71205 requires a vessel to maintain records of all ballast water activities listed by tank in a ballast water log, which must be kept onboard for two years. This information is critical for the Commission to verify the accuracy of submitted forms against the logs in determining compliance with the law.

(c) Class 3: Class 3 violations shall be issued when a cited party fails to submit the following information to the Commission, as required:

- (1) the ballast water reporting information required by section 71205, subdivision (c) of the PRC;
- (2) the “Ballast Water Treatment Supplemental Reporting Form” as required by 2 CCR section 2297.1, subdivision (b);
- (3) the “Hull Husbandry Reporting Form” as required by 2 CCR section 2298;
- (4) the “Ballast Water Treatment Technology Annual Reporting Form” as required by 2 CCR section 2297.1, subdivision (a); or
- (5) any other forms required pursuant to section 71205 of the PRC.

SPECIFIC PURPOSE OF THE ADOPTION

The purpose of subpart (c) is to clearly define and describe Class 3 violations. Class 3 violations pertain to the submission, to the Commission, of the required forms as identified in PRC section 71205 and 2 CCR sections 2297.1 and 2298.

NECESSITY

This regulation is necessary to clearly define and describe the Class 3 violations, which pertain to the submission of required forms to the Commission. The Commission currently collects the required information on four forms. The timing of submittal for each form is established in statute and/or regulation, and is as follows:

- PRC section 71205 requires the submission of:
 - Ballast Water Reporting Form, submitted 24 hours in advance of arrival to a California port or place.
- 2 CCR section 2297.1(b) requires the submission of:
 - Ballast Water Treatment Supplemental Reporting Form, which is submitted to the Commission in written or electronic form upon departure of that vessel from a California port or place of call if that vessel discharged treated ballast water into the waters of the state.

- PRC section 71205 and 2 CCR section 2298 requires submission of:
 - Hull Husbandry Reporting Form, which is submitted 24 hours prior to a vessel's first arrival of each calendar year at a California port or place of call.
- 2 CCR section 2297.1(a) requires the submission of:
 - Ballast Water Treatment Technology Annual Reporting Form, which is submitted once annually within sixty (60) days after a written or electronic request by the Commission, from those vessels that discharge ballast water in California waters using a ballast water treatment technology.

All of the required forms are essential for the Commission to be able to accurately track and analyze the ballast water and biofouling management practices associated with over 9,000 vessel arrivals at California ports each year. The information collected by these forms strengthens the knowledge and ability of the Commission to accomplish the purpose of moving the state expeditiously toward elimination of the discharge of nonindigenous species into the waters of the State or into waters that may impact the waters of the State.

Section 2299.04 Penalties

The cited party shall be assessed a penalty for each violation issued pursuant to this article. The penalty structure for each class of violation, as described in section 2299.03 of this Division, shall be as follows:

(a) Class 1 violations

- (1) Class 1 violations are subject to penalties in the amount listed in the following table:

<u>Minor</u>	<u>Not to exceed \$5,000 per violation</u>
<u>Moderate</u>	<u>Not to exceed \$10,000 per violation</u>
<u>Major (I)</u>	<u>Not to exceed \$20,000 per violation</u>
<u>Major (II)</u>	<u>Not to exceed \$27,500 per violation</u>

- (2) Every ballast tank involved in a ballast discharge violating this division shall be deemed a separate Class 1 violation.

(b) Class 2 violations

- (1) Upon the first occurrence of a Class 2 violation by a vessel, in lieu of a penalty, a letter of noncompliance shall be sent to the cited party explaining the violation.
- (2) Subsequent occurrences by a vessel of the same type of Class 2 violation shall be subject to a penalty of \$10,000 per violation.

(c) Class 3 violations

- (1) Upon the first occurrence of a Class 3 violation, in lieu of a penalty, a letter of noncompliance shall be sent to the cited party explaining the violation.
- (2) Subsequent occurrences of the same type of Class 3 violation shall be assessed a penalty of \$1,000 per violation.
 - (A) Every thirty (30) day period that a required form or forms remains unsubmitted after the original period for submission identified in section 2299.03(c) of this division shall be deemed a separate violation.

SPECIFIC PURPOSE OF THE ADOPTION

The specific purpose of this adoption is to prescribe the maximum penalty amounts associated with each of the violation classes established by section 2299.03. Describing the potential penalty amounts for each class of violation provides transparency to the regulated community and cited parties regarding the potential liability that may attach to each violation.

NECESSITY

PRC section 71216 states that a person who violates the requirements of the Act may be liable for an administrative, civil penalty in an amount that shall not exceed twenty-seven thousand five hundred dollars (\$27,500) per violation per day. Given the broad range of violations of the Act that are possible, this regulation is necessary to provide

clarity to the regulated community and cited parties of the potential penalties that may be administered.

Subpart (a) describes the penalties associated with Class 1 violations, which pertain to the unlawful management of discharged ballast water.

Commission staff determined that the discharge of each illegally managed ballast tank shall be considered a separate violation. Every vessel typically has multiple ballast water tanks, and each tank (or pair of tanks) may be managed independently. As such, the management of each individual tank impacts the risk of introducing NIS into California's coastal waters. Each tank that is out of compliance, is assessed a separate Class 1 penalty relative to where the improper management occurred.

Commission staff scaled the maximum penalty amount based upon the risk of species introductions. The risk of NIS introduction increases the closer an improper exchange is conducted to land. The highest risk of NIS introduction occurs when a vessel discharges ballast water from one port to another without performing any kind of management. For example, a ballast water exchange conducted at 180 nautical miles (NM) from land has potentially more risk of NIS introduction than a proper exchange, but that risk is relatively lower than a vessel discharging unmanaged water. This scaled penalty value approach has been utilized by other agencies such as the Department of Fish and Wildlife in 14 C.C.R. section 747.

Subpart (b) is necessary to describe the penalties associated with Class 2 violations, which pertain to recordkeeping requirements. Upon the first violation, the cited party will be given a letter of noncompliance as a warning. This provides time for the cited party to properly assemble and maintain the required records on board the vessel. If, upon subsequent arrival at a California port or place, the cited party is found to still be in noncompliance, the penalty will be assessed.

Subpart (c) is necessary to describe the penalties associated with Class 3 violations, which pertain to vessel reporting requirements identified by PRC section 71205 and 2 CCR sections 2297.1 and 2298. The forms that are required to be submitted are essential for the Commission to track and analyze the ballast water and biofouling management practices of over 9,000 vessel arrivals to California ports or places per year. Forms not received within the time identified in section 2299.03(c) of this division, shall be assessed a penalty on a per form basis. Each additional thirty (30) days that pass without submission of the form shall constitute a separate violation.

Section 2299.05 Preliminary Actions

- (a) Prior to pursuing any enforcement action under the provisions of this article, the following preliminary procedures shall be followed.
 - (1) The Executive Officer shall provide a written notice of a violation to the cited party containing the following:
 - (A) a description of the violation;
 - (B) a statement that enforcement proceedings may be initiated; and
 - (C) notification that the cited party may, within ten (10) working days after receipt of the notice, submit a request in writing to the Executive Officer for a preliminary meeting.
 - (2) If the cited party requests a preliminary meeting with the Executive Officer, that meeting shall be held prior to any further enforcement actions and may include any discussions relating to the violations in question, including, but not limited to, whether a violation had in fact occurred, what evidence exists for the violation, and what classification should apply for each violation.
 - (3) If the cited party so requests and agrees to pay for all costs, the preliminary meeting shall be recorded and a transcript shall be prepared.
 - (4) The preliminary meeting shall be scheduled at the Executive Officer's discretion, but shall in no event be scheduled more than thirty (30) calendar days after the request for the meeting is received by the Executive Officer.
 - (5) Within ten (10) working days after the preliminary meeting, the Executive Officer shall provide written notice to the cited party of the decision as to whether enforcement action is to proceed.
- (b) If, after the procedures within subdivision (a) are followed, the Executive Officer finds that the cited party has committed a violation of any provision[s] referred to in this article, the Executive Officer may take any or all of the following actions:
 - (1) initiate proceedings pursuant to section 71216 of the PRC against the cited party to administratively impose civil penalties;

- (2) take whatever legal action is necessary and appropriate to obtain an order from the court enjoining the violation;
 - (3) notify the appropriate federal agency of any violation which may also constitute violation of federal law or regulation; or
 - (4) refer the violation to the local district attorney for prosecution pursuant to section 71217 of the PRC.
- (c) It is unnecessary for the Executive Officer to comply with the procedures of this section when issuing an order for a vessel to depart the waters of the state pursuant to section 71207, subdivision (d) of the PRC.

SPECIFIC PURPOSE OF THE ADOPTION

The purpose of section 2299.05 is to define the preliminary actions to be taken by the Executive Officer and cited party prior to the Commission pursuing any enforcement action on vessels receiving violations defined in section 2299.03.

The purpose of subsection (a) is to outline the preliminary procedure the Executive Officer shall follow prior to pursuing any enforcement activity.

The purpose of subsection (b) is to outline the steps the Executive Officer shall take after the preliminary procedures are followed and it appears that the cited party has committed a violation.

NECESSITY

Section 2299.05 is necessary to ensure a transparent enforcement process for the cited party. The preliminary actions outlined in subsection (a) provide the cited party the opportunity to request a meeting with the Executive Officer prior to any enforcement actions being pursued. This allows the cited party to discuss, with the Executive Officer, the violation and understand the nature of the evidence and the classification of the violation. The timing elements are necessary to ensure that the process occurs in a timely manner and in a way that the cited party is aware of its rights and obligations.

Subsection (b) is necessary to clarify the steps the Executive Officer will take, if after following the procedures in subsection (a), a violation is found to have occurred. The Executive Officer has various options provided under PRC section 71216 in proceeding with enforcement, including referring the action to the Attorney General's office.

Additionally, under PRC section 71207, the District Attorney can also prosecute a violation. Subsection (b) thus illustrates and provides the full options available so that the Executive Officer can fully act and that the cited party understands the options that can be brought against it.

Section 2299.06 Hearing Procedures

- (a) Civil penalties shall be administratively imposed for violations of the provisions of Division 36, Chapter 2 (commencing with section 71203) of the Public Resources Code and Title 2, Division 3, Chapter 1, Articles 4.6, 4.7, and 4.8 of the California Code of Regulations.
- (b) Except as otherwise specified in this article, the process to impose civil penalties shall be conducted in accordance with the Administrative Procedure Act located within Title 2, Division 3, Part 1, Chapter 5 (commencing with section 11500) of the Government Code and section 71216 of the PRC.
 - (1) The Executive Officer and the cited party may agree to settle the violation before, during, or after the commencement of proceedings to impose civil penalties.

SPECIFIC PURPOSE OF THE ADOPTION

The purpose of section 2299.06 is to define the sections of the Act and associated regulations subject to administrative enforcement. Section 2299.06 also specifies the provisions of the Government Code guiding the administrative processes and hearings.

NECESSITY

Subsection (a) is necessary because it defines the parts of the Act and associated regulations for which civil penalties may be imposed. This provides the regulated community with clarity of the intent of the regulation, which is to establish an administrative enforcement process for violations of the Act and/or associated regulations.

Subsection (b) is necessary to prescribe that all processes and hearings that impose civil penalties will be done in accordance with Title 2, Division 3, Part 1, Chapter 5 of the Government Code, which describes the formal hearing process for administrative adjudication. Additionally, to promote administrative efficiency and economy, it is necessary to provide to the Commission and cited parties the option to reach a settlement of the violation prior to full adjudication.

Section 2299.07 Complaint

- (a) After following the preliminary actions described in section 2299.05 of this article, the Executive Officer may commence proceedings to impose civil penalties by issuing a complaint.
- (b) The complaint must contain all of the following:
 - (1) a brief statement of the violation alleged, including the acts or failures to act that constitute a basis for liability;
 - (2) the amount of the civil liability;
 - (3) a statement that the cited party has the right to a formal hearing, upon request, at which they may be represented by counsel; and
 - (4) a statement that the cited party's right to a hearing will be deemed waived if the cited party fails to file a notice of defense with the Executive Officer within 30 days from the date the complaint was served on the cited party, or their agent for service.
- (c) A copy of the complaint shall be served upon the cited party either personally or by registered mail.
 - (1) Complaints served by registered mail shall be deemed served as of the postmark date.

SPECIFIC PURPOSE OF THE ADOPTION

Section 2299.07 details the procedures to be taken by the Executive Officer for issuing a complaint to administratively impose civil penalties if a finding of violation is determined under 2299.05(b) of this article.

The provisions contained within subsection (b) detail the formatting and information that must be included in the complaint by the Executive Officer.

Subsection (c) describes how the complaint shall be served upon the cited party.

NECESSITY

Section 2299.07 is necessary to clearly explain the process by which the Executive Officer may begin procedures to issue an administrative civil penalty against a cited party. Additionally, section 2299.07 is intended to provide clarity of procedures to be taken against the cited party, as well as their rights and responsibilities.

Section 2299.08 Notice of Defense

- (a) The cited party may, no later than 30 days after service of the complaint, submit a notice of defense to the Executive Officer at the principal office address identified in section 1901 of this Division.
- (b) The notice of defense shall be in the form and include the content described in section 11506 of the Government Code.
- (c) If, within the notice of defense the cited party requests a hearing on the merits, such a hearing shall commence within thirty (30) days after the Executive Officer receives the notice of defense.
 - (1) The Executive Officer and the cited party may stipulate to commence the hearing date later than thirty (30) days.
- (d) If the Executive Officer does not receive a notice of defense within 30 days after service of the complaint, the Executive Officer shall issue an order setting liability in the amount of the complaint.
 - (1) If the Executive Officer and cited party have reached a settlement of the violation, the Executive Officer shall issue an order setting liability in the amount of the settlement.
 - (2) An order setting liability shall not be subject to review by a court or agency.

SPECIFIC PURPOSE OF THE ADOPTION

The purpose of section 2299.08 is to detail the steps a cited party may take, if desired, to submit a Notice of Defense against a complaint received in accordance with section 2299.07.

The purpose of (a) is to define the amount of time a cited party has to submit a Notice of Defense after receiving a complaint from the Executive Officer.

The purpose of (b) is to inform the cited party of the required format for a Notice of Defense. This format is described in Title 2, Division 3, Part 1, Chapter 5, section 11506 of the Government Code.

If a hearing is requested by a cited party, subsection (c) sets the time after which the Notice of Defense is received that a hearing may commence.

The purpose of (d) is to set the time limit (30 days) during which a cited party may submit a Notice of Defense before receiving an order setting liability.

NECESSITY

Section 2299.08 and its provisions are necessary to provide the cited party an option to submit a Notice of Defense and to define the timing of actions that may be undertaken by the Executive Officer whether or not one is received. The format and content of the Notice of Defense is prescribed by Title 2, Division 3, Part 1, Chapter 5, section 11506 of the Government Code. It is necessary to cite this provision to give it force. Pursuant to Public Resources Code, section 71216, subdivision (d), a thirty (30) day period is required for the Notice of Defense.

Section 2299.09 Hearing

(a) A hearing shall be conducted by an independent hearing officer in accordance with the procedures specified in Title 2, Division 3, Part 1, Chapter 5 (commencing with section 11500) of the Government Code, except as otherwise specified in this section.

(1) In making a determination, the hearing officer shall take the following into consideration:

- (A) the nature, circumstances, extent, and gravity of the violation, taking into account the harm to the environment and ecology;
- (B) the cited party's past and present efforts to prevent, abate, or clean up conditions posing a threat to the public health and safety of the environment; and
- (C) the cited party's ability to pay the proposed civil penalty.

- (b) At the Executive Officer's discretion, the venue for the hearing shall be in either Sacramento County or Los Angeles County, unless the Executive Officer and the cited party stipulate to an alternate location.

SPECIFIC PURPOSE OF THE ADOPTION

The purpose of section 2299.09 is to define the process by which a hearing may be conducted if requested by the cited party as per section 2299.08. The procedures are established by Title 2, Division 3, Part 1, Chapter 5 of the Government Code. The purpose of (a) is to describe the considerations that a hearing officer may take in determining the extent of an assessed penalty. The purpose of (b) is to establish options for the potential venue that the Executive Officer may choose for a hearing to take place.

NECESSITY

Section 2299.09 is necessary to inform the cited party of their right to a hearing, if one is desired. The hearing process, as described in (a), is codified in the Government Code, Title 2, Division 3, Part 1, Chapter 5 (commencing with section 11500) and is added here as section 2299.09 for clarity. The necessity of (b) is to define the potential hearing locations and to provide flexibility based on the discretion of the Executive Officer and the cited party.